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No. 07-1601, 07-1607

In The

Supreme Court of the United States

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY AND UNION PACIFIC COMPANY, *Petitioners*

v.

UNITED STATES OF AMERICA, ET AL., *Respondent*

SHELL OIL COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA, ET AL., *Respondent*

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICUS CURIAE* GENERAL ELECTRIC COMPANY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Amicus curiae General Electric Company ("GE") possesses an important interest in the first question presented by these cases – namely, whether liability for "arranging" for disposal of hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a)(3), may be imposed for merely selling a commercially useful product and transferring ownership and control to a purchaser who then causes contamination involving that product.[1] Such a result, which is directly countenanced by the Ninth Circuit's judgment, cannot be squared with the statutory text, structure, and purpose. The only permissible course is for this Court not only to reverse the Ninth Circuit's judgment, but also to adopt a "sole purpose" or similarly restrictive test for imposing arranger liability under CERLCA.

GE's interest in the first question presented stems from its present status as a defendant in a CERCLA cost-recovery action arising from contamination at the Fletcher Paint site in New Hampshire. *United States v. General Electric Co.*, No. 06-CV-354 (D.N.H.) ("*Fletcher Paint*"). In that proceeding, the federal government seeks over $13 million in clean-up costs on the theory that GE "arranged" for disposal of hazardous waste merely by selling a product to a customer in an arm's-length commercial transac-

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[1] This brief has been filed with the written consent of the parties, which is on file with the Clerk of Court. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

tion. Like Shell's experience in the case at bar, GE's situation vividly illustrates the breathtaking scope of an "arranger" liability standard that subjects sellers of useful products to massive clean-up costs under CERCLA, even if they never acted with the intent to dispose of a hazardous substance.

CERCLA imposes on the plaintiff the burden of establishing that a "person" arranged for the disposal of hazardous substances. In *Fletcher Paint*, a federal district court has approved EPA's efforts to impose liability on GE based on entirely lawful sales of a product between 1953 and 1967 – long before the enactment of CERCLA in 1980 – even though the court found that disposal was not the "objective of the arrangement" between GE and its buyer and no evidence was presented that GE was aware of the buyer's disposal of any of the product purchased from GE.

GE never owned or controlled the Fletcher site. Its sole contact with the site was the bona fide sale to Fletcher of a PCB-containing substance called Pyranol for use as a plasticizing ingredient in the manufacture of paint and for other commercial purposes. GE did not transport the product to Fletcher, nor did GE have any control over what Fletcher did with the Pyranol once it left GE. Rather, Fletcher used its own employees and its own trucks to pick up Pyranol drums from GE facilities in New York and move them to the Fletcher plant in New Hampshire. Fletcher bought similar products from two other companies.

Fletcher stopped purchasing Pyranol from GE in November 1967, but continued attempting to use it

for commercial purposes for nearly a decade. Over time, the health of Fletcher's owner declined, as did its business. By the mid-1970s, Fletcher apparently ended its efforts to resell its inventory of PCBs to other companies and (unknown to GE) abandoned any drums it owned *in situ* at the site. Although evidence showed that drums were in good condition in 1975, Fletcher left them unmaintained and exposed to the corrosive effects of the harsh New Hampshire climate.

By 1987, when EPA came on site and inspected Fletcher's property, approximately twenty years had passed since Fletcher's last transaction with GE. EPA found PCB-containing drums on the site, which were unmarked and bore no GE logos or other identifying information.

Nevertheless, on November 10, 2008, the *Fletcher Paint* district court held that EPA was entitled to recover cleanup costs from GE under CERCLA based on an expansive theory of "arranger" liability. The court acknowledged that there was no evidence in the record that GE actually "desired" any disposal of waste. Nevertheless, the court imposed liability on the basis of a finding that GE understood that disposal of waste was "substantially certain" to result from its sale of Pyranol to Fletcher.

The *Fletcher Paint* decision makes clear that CERCLA "arranger" liability has become unmoored from any statutory bearings. If GE can be held liable for the disposal of waste based on its sale of Pyranol to Fletcher, then innumerable parties currently operating throughout the national economy may find themselves hit with untold millions of dollars in

wholly unexpected CERCLA liability, based on entirely proper commercial transactions that occurred decades ago. Such enormous retroactive liability runs flatly contrary to congressional intent and also raises serious constitutional questions.

Fletcher Paint also makes clear that this Court should not merely reverse the Ninth Circuit's judgment in the instant case and hold that "arranger" liability embodies a showing of *some* sort of intent on the part of the seller of a useful product. Rather than leaving the intent requirement undefined, this Court should prescribe the "sole purpose" test as the proper basis for arranger liability in the context of the sale of a useful product. That is, this Court should hold that responsibility for environmental clean-up under CERCLA's arranger liability provision may be imposed only if the sole purpose of the parties to the transaction is to dispose of hazardous substances.

ARGUMENT

I. ARRANGER LIABILITY UNDER CERCLA MUST BE LIMITED BY THE "SOLE PURPOSE" TEST.

CERCLA imposes liability for the costs of hazardous waste clean-up on four categories of potentially responsible parties ("PRPs"). 42 U.S.C. § 9607(a). *See United States v. Atlantic Research Corp.*, 127 S. Ct. 2331, 2334 (2007). Among CERCLA's categories of PRPs are persons who "*arranged for* disposal . . . of hazardous substances." 42 U.S.C. § 9607(a)(3) (emphasis added).[2]

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[2] In full, the "arranger" liability provision imposes liability on: "any person who by contract, agreement or otherwise ar-

This Court has never addressed the meaning of CERCLA's "arranger" liability provision. In the absence of guidance from this Court, the courts of appeals have split in delineating the parameters of the provision. This circuit conflict has centered largely on whether the intent of the parties must be to dispose of hazardous substances in order for the sale and shipment of hazardous substances to constitute an arrangement for disposal under CERCLA's "arranger" liability provision, and in particular on the *degree* of requisite intent. In GE's view, the better reasoned decisions in the courts of appeals interpret the provision to contain an intent requirement and to provide that "arranger" liability under CERCLA attaches only when two parties enter a transaction for the *sole purpose* of disposing of a hazardous substance. This standard best comports with the text of the "arranger" liability provision. It excludes from the ambit of CERCLA liability parties who intend merely to sell and transport useful products to their customers and who surrender both ownership and control of the products upon delivery to the customers.

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ranged for disposal or treatment or arranged with a transporter for disposal or treatment of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing hazardous substances." 42 U.S.C. § 9607(a)(3).

A. The Sole Purpose Standard Is Consistent With The Ordinary Meaning of The Term "Arranged For Disposal" In CERCLA's Arranger Liability Provision.

CERCLA does not define the term "arranged for" in the context of disposal. Under basic principles of statutory construction, the term therefore must be given its ordinary meaning, in accordance with the dictionary definition of the term. *See, e.g.*, *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995); *FDIC v. Meyer*, 510 U.S. 471, 476 (1994); *Perrin v United States*, 444 U.S. 37, 42 (1979).

The ordinary meaning of the word "arrange" is "to make preparations for," Webster's Third New International Dictionary 120 (1993), or to "plan for," Webster's II New College Dictionary 62 (2001). Both of these definitions plainly "connote[] an intentional action toward achieving [a] purpose." Pet. App. 70a (dissenting opinion).[3]

Applying this ordinary meaning of "arrange for," the *Burlington Northern* dissenters expressly recognized that a person must have acted with the specific purpose of disposing of hazardous substances in order to be considered a PRP under CERCLA's arranger liability provision. *Id.* The Seventh Circuit has adopted the same view. *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993). Under this standard, a party whose sole purpose is to sell a useful product cannot be deemed an "arranger" for the disposal of substances within the meaning of

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[3] All citations to "Pet. App." refer to the Petition Appendix filed in No. 07-1607.

CERCLA, even if the purchaser subsequently mishandles the product and creates environmental contamination.[4]

Judge Posner's statutory analysis in his opinion for the Seventh Circuit in *Amcast* demonstrates that the "sole purpose" standard is compelled by the text of the arranger liability provision. Focusing first on the ordinary meaning of "arrange for," Judge Posner observed that "[those] words imply intentional action." *Amcast*, 2 F.3d at 751. Applying an intent requirement, Judge Posner reasoned that the defendant in *Amcast* was not liable to the plaintiff-buyer under CERCLA as an "arranger for disposal. . . of hazardous substances" because the defendant's purpose was to sell and deliver its product to the buyer

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[4] Although they do not explicitly apply the purpose-centric, ordinary meaning of "arrange for," decisions in the Second and Eleventh Circuits also recognize the statutory imperative to divine the parties' intent. These circuits have held that the mere sale of a product cannot trigger CERCLA arranger liability, absent "additional evidence the transaction include[d] an 'arrangement' for the ultimate disposal of a hazardous substance." *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1319 (11th Cir. 1990); *Freeman v. Glaxo Wellcome, Inc.*, 189 F.3d 160, 164 (2d Cir. 1999). And both circuits have indicated that evidence of an intent to dispose is central to the "arrangement" inquiry. *See Florida Power*, 893 F.2d at 1319 (seller not liable as "arranger" because there was no evidence that it "intended to . . . dispose of hazardous waste by selling [its product]"); *Freeman*, 189 F.3d at 164 (holding that there was no evidence in record of an arrangement to dispose and citing comparable cases rejecting arranger liability theory on grounds that parties merely "intended" a product to be used in a particular manner and that their "motivation" in entering the transaction was not disposal of the product) (citations omitted).

for the buyer's use, not for the buyer to dispose of it. *Id.*

Judge Posner next addressed the significance that the plaintiff in *Amcast* attached to evidence that drivers employed by a common carrier with which the defendant arranged to make deliveries to the buyer inadvertently spilled the product when unloading it into the buyer's storage tanks. *Id.* at 748. The buyer seized on this evidence because CERCLA defines "disposal" to include accidental spills. 42 U.S.C. §§ 6903(3), 9601(29). Thus, the buyer argued, the defendant qualified as an "arranger for disposal" by virtue of its use of a common carrier that spilled the product when making deliveries. This same thesis animated the Ninth Circuit in *Burlington Northern*, leading it to surmise that "'disposal' need not be purposeful" in order for arranger liability to attach. Pet. App. 44a. The Seventh Circuit in *Amcast* rejected this supposition on the ground that it was foreclosed by the text of the arranger liability provision.

In reaching that conclusion, Judge Posner's opinion carefully compared the arranger liability provision with the quite different portion of CERCLA that treats as PRPs past and present owners or operators of facilities at which disposal of hazardous substances takes place. 42 U.S.C. §§ 9607(a)(1),(2). As Judge Posner explained, it is entirely consistent with the text of the latter provisions to interpret CERCLA as imposing liability on owners and operators even for entirely accidental disposals at their facilities because the language of the owner and operator provisions does not speak in terms of purposeful disposal – unlike the term "arrange for" in the arranger liability

provision. *Amcast*, 2 F.3d at 751.[5] By contrast, it defies the ordinary meaning of the term "arrange for" to interpret the arranger liability provision as imposing liability for accidental disposals on a party that intends merely to sell its product because, as Judge Posner correctly reasoned, no one purposefully plans (*i.e.*, arranges for) an accident. After all, under the ordinary meaning of the term, an "accident" necessarily is an unintentional event. *Id.* Accidents may, of course, be foreseeable. But mere knowledge by a seller that inadvertent spills are substantially certain to occur does not mean that the seller intended for an accident to happen. That is precisely the theory of arranger liability adopted by the Ninth Circuit in the instant case and the district court in GE's *Fletcher Paint* case. As shown by Judge Posner's opinion in *Amcast*, that theory has no foundation in the statutory text.[6]

In the end, the sole purpose standard encapsulates what Judge Posner described as the archetypal case "contemplated" by the text of CERCLA's arranger liability provision: a party that makes an agreement with a waste hauler or similar person

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[5] CERCLA's owner and operator provisions impose responsibility for environmental clean-up costs on "(1) the owner and operator of . . . a facility [and] (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which . . . hazardous substances were disposed of." 42 U.S.C. § 9607(a)(1),(2).

[6] As Judge Posner observed in rejecting this theory in another CERLCA case, "[i]t seems to us very odd, even in Superfund Cloudcuckooland, to attribute the negligent, unforeseeable conduct of the buyer's agents to the seller." *G.J. Leasing Co., Inc. v. Union Elec. Co.*, 54 F.3d 379, 385 (7th Cir. 1995).

with the sole purpose of conveying material containing hazardous substances to a treatment or disposal facility. Judge Posner had in mind "a person or institution that wants to get rid of its hazardous wastes [and] hires a transportation company to carry them to a disposal site. If the wastes spill en route, then such spillage is disposal and the shipper had arranged for disposal – though not in that form – the shipper is a responsible party." *Id.* In such cases, there is direct evidence that the shipper's purpose was disposal and arranger liability attaches. But the arranger liability provision simply does not encompass situations (such as GE's *Fletcher Paint* case) where "the shipper is not trying to arrange for the disposal of hazardous wastes, but [rather] is arranging for the delivery of a useful product. . . ." *Id.* In such cases, circumstantial evidence that the shipper knew that disposal could occur by dint of what the buyer subsequently might do or not do with the product cannot be the basis of arranger liability because the shipper itself lacked the requisite purpose to dispose of a hazardous substance: its purpose was to sell the product.

Interpreting the term "arrange for disposal" as requiring direct evidence that disposal was a seller's sole purpose is bolstered by the meaning of the word "disposal" in CERCLA's arranger liability provision. CERCLA incorporates the definition of "disposal" in the Solid Waste Disposal Act, 42 U.S.C. § 9601(29). Under the SWDA, "disposal" means "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any . . . *hazardous waste* into or on any land . . . so that [it] may enter the environment." 42 U.S.C.

§ 6903(3) (emphasis added). As the Second Circuit correctly observed, a product sold to a buyer is not "hazardous waste" within the meaning of the term "disposal." *Freeman v. Glaxo Wellcome, Inc.*, 189 F.3d 160, 164 (2d Cir. 1999).

Thus, a person who sells a product to a buyer cannot be deemed an "arrang[er] for disposal." That calculus does not change if the buyer fails to use all of the product and later discards or abandons portions of it. It is the seller's and buyer's collective intent at the time of the alleged arrangement that counts. And if the seller's purpose was not to have hazardous substances discharged, deposited, or otherwise placed into the land so that they may enter the environment, then the seller cannot be held liable as an arranger for disposal of hazardous waste. The buyer's subsequent actions with the product cannot alter that fact.

B. The Sole Purpose Standard Is Consistent With CERCLA's Strict Liability Regime And Does Not Exempt From Responsibility Owners And Operators Of Facilities Or Persons Who Retain Ownership And Control Of A Product Following Shipment To A Customer.

Interpreting the arranger liability provision to require a showing of purposeful disposal is not at odds with CERCLA's "system of strict liability." Pet. App. 9a. As the Sixth Circuit correctly pointed out in construing the "arranger" provision to contain an intent requirement: "The intent inquiry is geared only towards determining whether the party in question is a potentially liable party. Once a party is determined

to have the requisite intent to be an arranger, then strict liability takes effect. If an arrangement has been made, that party is liable for damages caused by the disposal regardless of the party's intent that the damages not occur." *United States v. Cello-Foil Prods. Inc.*, 100 F.3d 1227, 1232 (6th Cir. 1996); *see also Gencorp v. Olin Corp.*, 390 F.3d 433, 446 (6th Cir. 2004). In short, if a person arranges for the disposal of hazardous substances – *i.e.*, if disposal is the purpose of the transaction – then the person may be strictly liable for any spills that occur in connection with sale or transfer of the substances. But the converse is not true – the strict liability imposed by CERCLA does not govern who may be deemed an "arranger" in the first place.

Nor will adoption of the sole purpose standard affect the imposition of liability on parties that directly dispose of hazardous waste, or on parties that "owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). The "sole purpose" standard affects only arranger liability. The two issues are apples and oranges.

Moreover, the sole purpose standard will not enable a seller to evade responsibility for "sham" sales[7] or for environmental clean-up when it professes an intent to transfer its product for use by another party, but retains ownership and control of the product at the time of disposal. In such situations, the arranger liability provision would continue to apply. By its terms, the arranger liability provision imposes

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[7] *See United States v. Marine Shale Processors*, 81 F.3d 1361, 1365 (5th Cir. 1996) (sham recycling).

responsibility for clean-up costs on persons who arrange for the disposal of hazardous substances "owned or possessed by [those] person[s]." 42 U.S.C. § 9607(a)(3). Thus, a seller who never relinquishes title or dominion over its product, even after transfer for use by another party, is responsible for the product at the time of its disposal. Put another way, in such cases, whatever the seller's purpose in transferring the product, it cannot be divorced from disposal of the product when the seller maintains an ownership responsibility for the handling of the product. *See* Pet. App. 70a-73a (dissenting opinion). But the seller cannot be held liable as an arranger for disposal when it *surrenders* ownership and control upon delivery of the product, such that the act of disposal of the product is completely divorced from the seller's and buyer's purpose in entering the transaction.

Hence, the "sole purpose" test is entirely consistent with any legitimate statutory goal of ensuring that the parties responsible for the disposal of hazardous waste bear the financial costs attributable to its clean-up.

II. EXPANSIVE ARRANGER LIABILITY WOULD PRODUCE ABSURD AND UNCONSTITUTIONAL RESULTS.

Unless arranger liability is properly limited to the "sole purpose" test, it will produce unreasonable – indeed, even patently absurd – results that violate congressional intent and raise serious constitutional questions.

A. General Electric's *Fletcher Paint* Case Illustrates the Potential For Unreasonable Breadth of Arranger Liability.

GE's own experience at the Fletcher Paint site illustrates the dangers of an expansive interpretation of CERCLA's arranger liability provision. EPA's action against GE stems from sales that occurred between 1953 and 1967.[8] During that period, Monsanto Company manufactured Aroclor, a chemical product containing polychlorinated biphenyls ("PCBs"). GE purchased Aroclor from Monsanto and processed it to create Pyranol, the trade name for a mixture that GE used as a dielectric fluid in its capacitor manufacturing operations in New York. GE's technical specifications for its sensitive capacitor operations were extraordinarily exacting. Even trace amounts of free chlorides, water, or other impurities caused GE to reject a particular batch of Pyranol for capacitor manufacturing and to designate that batch as "scrap," although it could be used for other less-demanding purposes.

As a result of scrap Pyranol's usefulness, GE was able to sell some of it to Fletcher Paint Works ("FPW"), an independent paint manufacturing business in New Hampshire that GE neither owned nor operated. FPW used Pyranol in its paint manufacturing operations as a plasticizer of rubber-based paint and for other experimental applications. FPW also purchased similar PCB-containing products from other vendors for similar purposes. Pyranol was par-

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[8] The history presented here is drawn from GE's factual submissions in the *Fletcher Paint* litigation.

ticularly useful to FPW because it was a more cost-effective ingredient than alternative PCB products.

Although GE sold Pyranol to FPW between 1953 and 1967, it did not deliver or arrange for the delivery of the product to FPW. Indeed, FPW or its agents took possession of the Pyranol before it even left GE's plants. FPW used its own employees and trucks (or, on a few occasions, hired a third party) to transport Pyranol, at its own expense, from GE's plants in New York to FPW's plant in New Hampshire. Prior to loading the Pyranol into their trucks and leaving GE's facilities, FPW's drivers or agents had the opportunity to (and routinely did) test the Pyranol's quality, check the drums for leakage, and perform any needed drum repairs at the GE facilities, using tools that they brought with them specifically for that purpose. In light of the secure state of the drums at the time they left the GE facilities, and the inspections performed by FPW drivers, GE had no reason to expect any releases or spillage from the drums that FPW picked up from GE.

FPW controlled the Pyranol from the moment of pick up at GE. Thus, in addition to using Pyranol in its own operations, and unbeknownst to GE, FPW resold some of it to other companies. In some cases, FPW processed the Pyranol before reselling it, while in other cases FPW resold the product in the same condition as when it had been transported from GE. FPW's customers then put Pyranol to their own productive uses. FPW's primary Pyranol customer, W.F. Webster Cement ("Webster"), used the product in the manufacture of roof coating products.

In late 1967, Webster was acquired by another company and soon stopped purchasing Pyranol from FPW. This unexpected development left FPW with a surplus inventory of Pyranol that had been earmarked for sale to Webster. As a result of these changed circumstances, FPW ceased buying Pyranol from GE in 1967 and in fact refused to pay its last invoice of nearly $7,000. After attempting to recover the outstanding balance, GE was forced to write off the amount in 1968, and the two companies had no contact at all after the early 1970s.

FPW continued to operate an active business on the property long after its relationship ended with GE. In 1987, some twenty years after GE's last sale of scrap Pyranol to FPW, EPA discovered approximately 800 drums containing hazardous substances at the FPW site. The drums had apparently been stored outdoors, exposed to the elements of the New Hampshire weather. All of the drums were either unmarked or bore no obvious indicia of their source. There was no evidence to link any of the drums – even those containing PCBs – to GE.

Nevertheless, EPA issued administrative orders to GE in 1995 and 2001, charging GE with responsibility for the release of PCBs at the Fletcher Paint site without ever having established that GE arranged for disposal. Pursuant to these orders, GE has undertaken and is continuing to undertake massive efforts to clean up the site, at a cost of over $7 million to date. Despite these efforts, the federal government filed a separate CERCLA suit against GE to recover an additional amount (over $13 million) in response costs. *United States v. General Elec-*

tric Co., No. 06-CV-354 (D.N.H. filed Sept. 20, 2006) (hereinafter *Fletcher Paint*). Moreover, the government has indicated that it will seek an estimated $34 million in future costs from GE, bringing the total to over $54 million.

On November 10, 2008, the district court ruled after a bench trial that GE could be held liable under CERCLA for EPA's response costs on the theory that GE "otherwise arranged for disposal" of PCBs at the Fletcher Paint site. The court held that such "arranger liability" extends to parties who enter an arrangement "know[ing] that disposal is *substantially certain* to result." Tr. at 135 (emphasis added).[9] The court found that "GE understood that while Mr. Fletcher hoped to make productive use of some of the Pyranol, he clearly could not make productive use of much of it." Tr. at 152. As a result, the court concluded, "GE understood that this was an arrangement with Mr. Fletcher that would result in Mr. Fletcher disposing of substantial quantities of the scrap Pyranol at the site." *Id.* at 154.

The court held GE responsible for the clean-up at the FPW site on an arranger liability theory despite acknowledging that disposal of the Pyranol was *not* GE's "desired outcome." *Id.* at 135. In canvassing the record in the case, the district court stated unequivocally that "GE did not in entering into the arrangement desire that the barrels be disposed of. That was not the objective of the arrangement." *Id.* at 152. For good measure, the court observed that

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[9] All citations to "Tr." refer to the transcript of the hearing before the district court held on November 10, 2008.

there was absolutely no evidence in the record that GE actually "desired this disposal." *Id.* at 63. "It's undisputed that GE's principal objective was to be rid of the scrap Pyranol. . . . GE was indifferent to whether it would be used in a product or released into the environment." *Id.* Although GE may have wanted "to be rid of what it believed was a waste product and to do it in the most economically viable way," the company was at worst "indifferent to what happened to it after it got to the Fletcher's property." *Id.* at 148. There was simply no evidence that GE "desired that [the scrap Pyranol] be released into the environment." *Id.*

The district court's decision in GE's *Fletcher Paint* case illustrates the abusive potential of "arranger" liability under CERCLA. Whatever the source of the PCB-contaminated drums found by EPA at the FPW site in 1987, any "disposal" of that waste did not stem from GE's conduct during its commercial relationship with FPW in the 1950s and 1960s. Any leakage or release occurred solely because of what Fletcher did with the drums later, long after GE ceased to exercise any ownership, possession, or control over the material in question.

To impose "arranger" liability in such circumstances would shatter any statutory boundaries. The text of the statute, as addressed in Part I, supra, forecloses the district court's view that a company somehow "arranges" for disposal by selling more of a product than (it turns out, in retrospect) the buyer can use. Such a situation bears no resemblance to the example of hiring a waste hauler to transport hazardous waste to a treatment or disposal facility,

which Judge Posner properly identified as the paradigmatic instance of CERCLA "arranger" liability. Indeed, under the district court's construction, GE would arguably be subject to "arranger" liability even if Fletcher had not abandoned the site but instead had shipped all the PCB-containing drums to a licensed treatment facility. Even in that situation, according to the district court, GE would have been "substantially certain" that disposal would occur.

The district court's interpretation would result in additional, equally unreasonable consequences, such as authorizing the imposition of "arranger" liability on Monsanto. For all relevant purposes, GE's sales of Pyranol to FPW were no different in intent from GE's purchases of Aroclor from its manufacturer (Monsanto) or from FPW's own sales of Pyranol to *its* customers. Like GE, Monsanto knew that FPW had an excess supply of scrap Pyranol. (FPW approached Monsanto in an attempt to sell some of it.) And like GE, Monsanto knew nothing about how FPW stored its inventory of scrap Pyranol at its plant.

The imposition of "arranger" liability in *Fletcher Paint* would make every seller in a series of suppliers a potential "arranger" of disposal, no matter how temporally remote its sale from the eventual actual release of hazardous substances. Such a theory has no logical stopping point and would lead to the specter of an endless chain of CERCLA liability, running through all sectors of the economy, foisting responsibility on each company that in turn sold a useful product at arm's length to the next. Under the view of the Ninth Circuit and the *Fletcher Paint* court, interdependence and specialization of labor – the sine

qua non of economic efficiency – would allow EPA to tap into whatever deep pockets it could find to subsidize the government's cleanup projects.

B. *Fletcher Paint* Illustrates That Mere Reversal of the Ninth Circuit's Judgment, By Itself, Is Not Enough.

The *Fletcher Paint* decision also makes clear that this Court should not merely reverse the Ninth Circuit's judgment in the instant case and hold that "arranger" liability embodies some sort of undefined intent requirement. Rather, this Court should prescribe the "sole purpose" test or something similarly restrictive as the proper predicate for CERCLA "arranger" liability in the context of the sale of a useful product. Merely reversing the Ninth Circuit's judgment, by itself, would not be enough to produce the necessary clarification and avoid the impermissible expansion of "arranger" liability in the lower courts.

After all, the district court in *Fletcher Paint* was able to impose unwarranted liability on GE even while purporting to reject the Ninth Circuit's interpretation of the arranger liability provision in *Burlington Northern*. *See* Tr. at 17-19 (opining that the Ninth Circuit adopted "an overly expansive unrealistic definition of the arranger liability standard" and asserting that it was using "a different standard," such that "if *Burlington Northern* is reversed by the Supreme Court, it does not necessarily follow that the standard that I'm using is incorrect").[10]

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[10] The *Fletcher Paint* arranger liability standard is, in at least one important respect, even more expansive and unreasonable than the Ninth Circuit's test in *Burlington Northern*.

The district court imposed "arranger" liability by ignoring the statutory text that defines such liability and by placing an unrealistic burden on sellers of products containing hazardous substances. Just as the Ninth Circuit impermissibly deemed Shell liable because its "sale of a useful product necessarily and immediately result[ed] in the leakage of hazardous substances," Pet. App. 45a, the district court in *Fletcher Paint* held that GE was liable as an "arranger" because its sale of Pyranol was "substantially certain" to result in disposal of PCBs. That an event

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For all its flaws, the Ninth Circuit at least premised liability on a finding that Shell played some direct role in the disposal: "Shell arranged for delivery of the substances to the site by its subcontractors; was aware of, and to some degree dictated, the transfer arrangements; knew that some leakage was likely in the transfer process; and provided advice and supervision concerning safe transfer and storage." Pet. App. 46a. (It is GE's position that, despite those findings, Shell should not be subject to "arranger" liability, as they do not change the fact that disposal was not Shell's sole purpose in selling a useful nematocide to its customer.)

But the disposal at issue in *Fletcher Paint* was purely a function of FPW's – and only FPW's – conduct, including leakage from drums that FPW stored for decades outdoors at its site. GE did not "dictate[] the transfer arrangements" for delivering scrap Pyranol to FPW. Instead, FPW used its own employees and trucks (or, on a few occasions, hired a third party) to transport scrap Pyranol at its own expense; and prior to loading the scrap Pyranol into their trucks and leaving GE's facilities, FPW's drivers or agents had the opportunity to (and routinely did) test the scrap Pyranol's quality, check the drums for leakage, and perform any needed repairs. Nor did GE play any role in how FPW decided to store drums at its plant: GE did not "dictate" the improper storage conditions and in fact knew nothing about them. Indeed, GE surrendered all control of the drums to FPW at the time that FPW's drivers or agents picked them up at GE's facilities.

is "substantially certain" to occur, given the inherent limits of industrial hygiene and the vagaries of nature, does not mean that it is *intended* to occur – *i.e.*, that its occurrence was "*arranged*." The presumption that actors may be deemed to intend the natural consequences of their actions is not to be blindly attributed to Congress, especially where it produces unreasonable results or collides with other important values. *See, e.g., Giles v. California*, 128 S. Ct. 2678, 2684 (2008) (holding in context of Confrontation Clause that knowledge that murdered witness would be unavailable to testify at trial would be insufficient to show that "the defendant intended to prevent a witness from testifying"); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 275-76 (1993) (holding that antiabortion demonstration's incidental effect on women's right to interstate travel did not suffice to show intent to deprive those women of their protected interstate travel right, even though burden was foreseeable and natural consequence of the blockades); *Sandstrom v. Montana*, 442 U.S. 510, 518-24 (1979) (invalidating instruction that the accused was presumed to intend the ordinary consequences of his voluntary acts).

The *Fletcher Paint* decision demonstrates that the "substantially certain" test does not impose an adequate limit on CERCLA "arranger" liability. The district court was able to conclude that the "substantially certain" test was met, even though the court did *not* find – nor could it have found – that GE knew that FPW would lose its chief customer after the GE sales had ended; that the health of FPW's owner and its business would decline; that FPW would ulti-

mately choose to abandon the site many years after the GE sales ended; and that FPW would choose to dispose of the product improperly, by storing the drums outdoors and exposing them for years to the elements of New Hampshire's harsh climate. The district court's holding demonstrates that, in practice, the "substantially certain" test is no limit on CERCLA "arranger" liability at all. If the test can be satisfied in *Fletcher Paint*, it can be satisfied in virtually any useful product case. The test would effectively require each seller, in order to avoid liability under the "arranger" test, to divine how every one of its customers will store and handle the product, in perpetuity.

In sum, cases like *Fletcher Paint* illustrate the unreasonable breadth of a standard that holds sellers of useful products liable as arrangers of disposal even when it is undisputed that they did not intend for disposal to occur. Such expansive liability was never envisioned by Congress, which instead chose to tax manufacturers of useful chemical products for contribution to the Hazardous Substance Superfund. *See* 26 U.S.C. §§ 4611, 4661, 4662. In keeping with the text and structure of the statute, the proper standard in holding a seller of a product liable as an arranger of disposal is whether, in entering the sales arrangement, the seller's sole purpose was to dispose of the hazardous substance in question.

C. Expansive Arranger Liability Raises Serious Constitutional Questions.

In the hands of the Ninth Circuit and the *Fletcher Paint* court, "arranger" liability empowers the government to impose severe, retroactive, multi-

million-dollar liability for commercially reasonable, arm's length transactions, based entirely on what the buyer of a product chooses to do with it, completely outside the seller's control. Although the lower courts have upheld CERCLA against facial constitutional challenges,[11] the expansion of "arranger" liability raises uniquely troubling questions under the Fifth Amendment. Such untrammeled "arranger" liability is constitutionally problematic *precisely because* CERCLA is such strong medicine and because it operates with respect to waste disposal that occurred prior to its enactment. *See, e.g.*, *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1351 (Fed. Cir. 2001); *United States v. Olin*, 107 F.3d 1506, 1512-15 (11th Cir. 1997). CERCLA's retroactive application of strict, joint and several liability to non-negligent activity is unique in American law and has imposed massive economic costs. *See* Stephen Breyer, BREAKING THE VICIOUS CYCLE: TOWARD EFFECTIVE RISK REGULATION 18 (1993). CERCLA contains ready ingredients for the unconstitutional imposition of arbitrary liability. It is these very features of CERCLA that militate against the willy-nilly expansion of "arranger" liability to cover the sale of a product to a buyer in a bona fide commercial relationship.

In other contexts, this Court has held that, even where a party is causally responsible for a particular

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[11] *See, e.g.*, *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 188-90 (2d Cir. 2003); *United States v. Dico, Inc.*, 266 F.3d 864, 879-80 (8th Cir. 2001); *Franklin County Convention Facilities Authority v. American Premier Underwriters, Inc.*, 240 F.3d 534, 550-53 (6th Cir. 2001).

harm in a but-for sense, the Constitution imposes limits on the imposition of retroactive liability, to ensure that the liability is reasonably foreseeable and proportionate to the party's conduct. *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). In *Eastern Enterprises*, the Court held that, under the Fifth Amendment, the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-9722, could not be applied retroactively to require a company that had once owned a coal mining business to pay health care benefits to over 1,000 former employees of that business. Although there was no single opinion for the Court, Justice O'Connor, writing for a plurality that included Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, distilled from prior case law three factors of "particular significance" to a Fifth Amendment takings inquiry: "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." 524 U.S. at 523-24.

The remaining Justices applied similar reasoning, although they would have framed the inquiry in terms of Fifth Amendment due process rather than the Fifth Amendment's Takings Clause. In the opening paragraph of his separate opinion, Justice Kennedy went out of his way to underscore that he was "in full accord with many of the plurality's conclusions." 524 U.S. at 539 (Kennedy, J., concurring in the judgment and dissenting in part). He agreed that "[t]he plurality's careful assessment of the history and purpose of the statute in question demonstrates the necessity to hold it arbitrary and beyond the legitimate authority of the Government to enact." *Id.*

Even the dissenters agreed that retroactive liability is constitutional only if the parties on whom costs are imposed may *reasonably* be held responsible for the expenses they are being asked to bear. *See* 524 U.S. at 556-58 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting). The dissenters explained that, "like the plurality," they "would inquire if the law" as applied retroactively was "fundamentally unfair or unjust." *Id.* at 558. "[T]he Due Process Clause can offer protection against legislation that is unfairly retroactive . . . for . . . a law that is fundamentally unfair because of its retroactivity is basically arbitrary." *Id.* at 557 (Breyer, J., dissenting).

Eastern Enterprises underscores that Fifth Amendment takings and due process questions raised by retroactive application of a statute are not coterminous with the issue of causation of the harms that the statute is designed to redress. After all, Eastern Enterprises itself was linked to the injury the Coal Act sought to remedy: the company had employed the miners involved, had benefited from their past labor, and was at least partially responsible for their health conditions. Yet retroactive application of the statute to Eastern Enterprises was held unconstitutional. Indeed, all nine Justices in *Eastern Enterprises* made clear that the Fifth Amendment may sometimes preclude the imposition of disproportionate retroactive liability *even if a party is somehow causally responsible for the harm in question*. Eastern "could not have contemplated liability" of the magnitude it faced. 524 U.S. at 531. Even though there was a causal link, it was too "tenuous." *Id.*; *see also id.* at 549-50 (opinion of Kennedy, J.); *id.* at 558-59, 566-68 (Breyer, J., dis-

senting). All nine Justices concluded that a reviewing court must engage in a fact-intensive inquiry to consider the particular facts and circumstances of individual statutory applications in determining whether the retroactive imposition of liability violates the Fifth Amendment. *See* 524 U.S. at 523, 528-29 (plurality); *id.* at 549-50 (opinion of Kennedy, J.); *id.* at 559, 566-68 (Breyer, J., dissenting). *See also Kelo v. City of New London*, 545 U.S. 469, 493 (2005) (Kennedy, J., concurring) (citing separate opinion in *Eastern Enterprises* as calling for "heightened scrutiny for retroactive legislation under the Due Process Clause"); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005) (Kennedy, J., concurring) (citing *Eastern Enterprises* concurrence for the proposition that "a regulation might be so arbitrary or irrational as to violate due process"); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 324 (2002) (citing *Eastern Enterprises*); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 174 (2003) (Scalia, J., joined by O'Connor and Thomas, JJ., dissenting) ("We have held that the Commissioner's use of this power [to require coal companies to pay health benefits] violates the Constitution to the extent it imposes severe retroactive liability on certain coal companies.") (citing *Eastern Enterprises*).[12]

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[12] The lower courts have read *Eastern Enterprises* in this fashion. *See, e.g., Asociación De Subscripción Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 20 (1st Cir. 2007) (following *Eastern Enterprises* and explaining: "[f]ive members of the Court went on to conclude that the Coal Act's application to Eastern was unconstitutional, but Justice Kennedy relied on due process, rather than takings,

Retroactive "arranger" liability for the sale of a product – absent any showing that disposal was the seller's and buyer's "sole purpose" – runs afoul of the constitutional limits identified in *Eastern Enterprises*. First, as GE's experience demonstrates, "the economic impact of the regulation," *Eastern Enterprises*, 524 U.S. at 523, can be severe. GE has already spent over $7 million to comply with EPA administrative orders to clean up the FPW site, has now been held liable for EPA response costs of over $13 million, and faces the prospect that the govern-

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principles"); *U.S. Fidelity & Guar. Co. v. McKeithen*, 226 F.3d 412, 416-20 (5th Cir. 2000) (applying the three *Eastern Enterprises* factors to hold that a state workers' compensation statute altering a funding formula violated the Fifth Amendment as applied to pre-enactment insurance contracts of insurers who had withdrawn from the state market or had substantially reduced their underwriting in the state); *Golan v. Ashcroft*, 310 F. Supp. 2d 1215, 1220 (D. Colo. 2004) (focusing on "Justice Kennedy's concurrence in *Eastern Enterprises* for the proposition that retroactive legislation that unfairly burdens individuals and disrupts settled expectations is arbitrary and, thus, violates due process," in order to deny motion to dismiss due process claim). Commentators have expressed the same view. *See, e.g.*, Bruce Howard, "A New Justification for Retroactive Liability in CERCLA: An Appreciation of the Synergy Between Common and Statutory Law," 42 ST. LOUIS U. L.J. 847, 847 n.a1 (1998) ("[T]he decision in *Eastern Enterprises* makes it clear that courts must be prepared to find that in any given case the particular facts of CERCLA liability, if enforced against an unfortunate party to the limits of the strict, joint, several and retroactive law, will run afoul of the takings and due process clauses of the Constitution"); Jan G. Laitos, "The New Retroactivity Causation Standard," 51 ALA. L. REV. 1123, 1129 n.35 (2000) ("The *Eastern Enterprises* result raises questions about the constitutional validity of CERCLA"); Daniel E. Troy, "Retroactive Legislation" 85 (American Enterprise Institute 1997) (arguing that retroactive application of CERCLA may be unconstitutional).

ment will seek an additional $34 million in future costs from GE. These costs far exceed the revenues generated by GE's sales of Pyranol to FPW, which never surpassed $4.00 per 55-gallon drum. In *Eastern Enterprises*, by contrast, the coal company had earned substantial profits from mining from 1947-1964 and from its subsidiary thereafter, which more than offset the retroactive liability imposed by the government. See 524 U.S. at 516.

Second, the imposition of "arranger" liability in cases like *Fletcher Paint* will "interfere[] with reasonable investment backed expectations." *Eastern Enterprises*, 524 U.S. at 523-24. GE never owned or controlled the Fletcher site. Its sale of a product to FPW was entirely lawful and reasonable at the time it occurred. The sales ended in 1967, long before CERCLA was enacted, and long before FPW ceased its own commercial operations or stopped reselling Pyranol to other parties. There was no way GE could have known that FPW would ultimately be left with unsold inventory or that it would choose to mishandle drums of PCB material. The rationale of the *Fletcher Paint* decision threatens to upset the settled expectations of sellers that will be shocked to discover that CERCLA liability may arise from entirely lawful sales of useful products, based entirely on the unforeseeable misconduct of buyers occurring years after the commercial relationship has ended.

The imposition of liability in *Fletcher Paint* also contravenes the third *Eastern Enterprises* factor -- "the character of the governmental action." 524 U.S. at 524. In *Eastern Enterprises*, the statute's remedial payment scheme was neither wholly unfamiliar to,

nor unforeseeable by, Eastern, which had operated its former coal mining business against the background understanding of a 1946 labor agreement, a 1947 retirement fund, and a 1950 benefit plan – all of which contained health care provisions for miners. *See* 524 U.S. at 505-08. Here, by contrast, the character of the governmental action is extraordinary. "[P]arties could not be expected to have foreseen CERCLA before it was enacted." *Purolator Prods. Corp. v. Allied-Signal, Inc.*, 772 F. Supp. 124, 132 (W.D.N.Y. 1991). There is no way that GE could have foreseen that it could one day be held liable for over $54 million in costs to clean up waste disposed of by FPW when that company abandoned its site. Even under the dissenting opinion in *Eastern Enterprise*, the imposition of CERCLA response costs pursuant to an expansive theory of "arranger" liability would be unconstitutional as applied in the *Fletcher Paint* case because GE is simply not *responsible* in any real sense for the expenses which it is being forced to bear. *See* 524 U.S. at 556-58, 566-68 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting).

At the very least, this Court should avoid an interpretation of CERCLA arranger liability that raises such serious constitutional questions. *See Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

CONCLUSION

The Ninth Circuit's judgment should be reversed, and this Court should prescribe the "sole purpose" test or a similarly restrictive standard for the imposition of "arranger" liability in the context of the sale of a useful product.

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